

SERVED: November 9, 1995

NTSB Order No. EA-4404

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of October, 1995

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14019
v.)	
)	
KEVIN A. CASS,)	
)	
Respondent.)	
)	

ORDER DISMISSING INTERLOCUTORY APPEAL

By Order entered August 1, 1995,¹ the law judge granted, over the Administrator's opposition, a request by the respondent for an interlocutory appeal from the law judge's denial of his motion for summary judgment on the Administrator's complaint in this proceeding, which charged a single violation of the "motor vehicle action" reporting requirement in section 61.15(e) of the Federal Aviation Regulations.² The law judge's order does not identify the issues in the denied motion for summary judgment he

¹A copy of the order, which does not bear a service date, is attached.

²The complaint seeks a 60-day suspension of respondent's certificates.

believes require resolution by the Board or articulate, as required by Section 821.16 of the Board's Rules of Practice, 49 C.F.R. Part 821,³ the undue prejudice the respondent would suffer in the absence of the requested interlocutory appeal. Because we conclude, as discussed below, that the appropriateness of interlocutory review has not been affirmatively demonstrated, the appeal will be dismissed and the case remanded for hearing.⁴

In his motion for summary judgment, the respondent argued that the Administrator's suspension order should not be sustained because its issuance conflicted with provisions of the Administrative Procedures Act, the Federal Aviation Act and the Administrator's own internal administrative policies on enforcement matters. Without discussing the particulars of any of the respondent's contentions, or the Administrator's detailed response to them, the law judge, by order entered July 13, "overruled" the motion, opining only that the "issues raised by the [motion] are ones that properly should be considered before

³Section 821.16 provides as follows:

§ 821.16 Appeals from law judge's interlocutory rulings and motions.

Rulings of law judges on motions may not be appealed to the Board prior to its consideration of the entire proceeding, except in extraordinary circumstances and with the consent of the law judge who made the ruling. An appeal shall be disallowed unless the law judge finds, either on the record or in writing, that to allow such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to any party. If an appeal is allowed, any party may file a brief with the Board within such time as the law judge directs. No oral argument will be heard unless the Board directs otherwise. The rulings of the law judge on motion may be reviewed by the Board in connection with its appellate action in the proceeding, irrespective of the filing of an appeal from the motion or any action taken thereon.

⁴The Board's rule on interlocutory appeals imposes on a law judge the duty to determine whether a party should be excused from the general prohibition, universally endorsed by administrative and judicial fora alike, against appeals from interim rulings in a case; that is, rulings that, for the most part, obligate a litigant to proceed despite having had a legal objection overruled. This duty is not discharged by a conclusory determination that neither reveals the basis for a finding that there is an issue the Board should review before the matter is fully litigated, nor identifies the issue the law judge believes warrants such review.

the full National Transportation Safety Board and/or the appropriate Federal Circuit Court of Appeals." The law judge gave no reasons for his apparent belief that it would not be appropriate for him to rule on the respondent's legal arguments in the first instance, and we can discern none.⁵ Stated differently, no basis apparent on the record or adverted to by the law judge establishes that there were extraordinary circumstances justifying the law judge's consent to this request for premature Board review.

We also find unpersuasive the law judge's apparent attempt to identify some adverse impact that might befall the respondent if an interlocutory appeal were not allowed. In this connection, the law judge, albeit having rejected respondent's challenge to the Administrator's suspension order, suggests that undue prejudice results from the fact that the respondent and others will continue to face possible suspension of their certificates for failure to comply with the reporting requirement in FAR section 61.15(e) unless the Board or a court agrees with the respondent that the Administrator's pursuit of a suspension for a violation of the regulation *in this case* is neither lawful nor fair: "The prompt resolution of the issues raised in Respondent's [motion] can prevent undue prejudice to this Respondent and others in the aviation community if the issues raised" are *sustained*.⁶ To the extent we understand the law judge's point, which is not the one the respondent pressed in seeking relief, we do not concur that the risk to others of prosecution under the regulation or respondent's need to defend against a charge under it in this proceeding amounts to prejudice, undue or otherwise, so as to justify interlocutory relief. The respondent's belief that he has identified reasons why no suspension should be sustained for any breach of the regulation he may have committed does not establish that he, or anyone else subject to the regulation, will suffer injury of any kind, much less irreparable harm, if required to litigate the matter fully at the hearing level before being able to present those reasons to the Board.

As to the respondent's expressed concern that he needed to

⁵The parties' pleadings contained no suggestion that any of the issues presented by the motion for summary judgment were not suitable for disposition by the law judge. To the contrary, the respondent's request for an interlocutory appeal registered his belief that the law judge possessed the requisite authority to rule on the substantive questions posed by the motion, a proposition the Administrator did not dispute.

⁶In the context of the law judge's two orders, we understand his use of the term overrule to mean "deny" and sustain to mean "grant."

ask for interlocutory review in order to preserve his several legal objections to the suspension order, the clear language of Section 821.16 should have dispelled any such belief: "[t]he rulings of the law judge on motion may be reviewed by the Board in connection with its appellate action in the proceeding, *irrespective* of the filing of an appeal from the motion or any action taken thereon" (emphasis added). It was thus not sufficient for the respondent to assert, in his request for an immediate appeal, that, given the law judge's ruling, the only issue left for hearing was the matter of sanction, for absent some indication explaining how resolution of issues related to sanction in advance of the Board's review of the denied motion for summary judgment would negatively impact on him, there appears to have been no basis on which the law judge could conclude that an interlocutory appeal must be permitted in order to spare the respondent undue prejudice.

ACCORDINGLY, IT IS ORDERED THAT:

1. The order of the law judge granting an interlocutory appeal is reversed;
2. The interlocutory appeal is dismissed; and
3. The case is remanded to the law judge.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above order.